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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>BOBBY LEWIS BLACK,<br><br>Defendant and Appellant. | B233126<br><br>(Los Angeles County<br>Super. Ct. No. PA056470) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Ronald S. Coen, Judge. Affirmed in part and reversed in part.

Carla Castillo, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Linda C. Johnson and Blythe J. Leszkay, Deputy Attorneys General, for Plaintiff and Respondent.

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## INTRODUCTION

Defendant Bobby Lewis Black appeals from a judgment entered following his conviction by a jury trial of four counts of second degree robbery (Pen. Code,[1] § 211), eight counts of assault with a firearm (§ 245, subd. (a)(2)), and one count of attempted second degree robbery (§§ 211, 664). After a court trial, the following allegations as to all counts were found to be true: (1) a principal was armed with a firearm (§ 12022, subd. (a)(1)); (2) defendant had three prior strike convictions (§§ 667, subds. (b)-(i), 1170.12); (3) defendant had three prior serious felony convictions (§ 667, subd. (a)(1)); and (4) defendant had served seven prior prison terms (§ 667.5, subd. (b)). The court sentenced defendant to 198 years to life in prison.

On appeal, defendant contends the trial court abused its discretion in finding a competency hearing was not warranted and failing to appoint a doctor to evaluate his competence. He also claims the trial court erred in failing to stay the sentence on count 11 and that various prior convictions were not supported by substantial evidence. We agree that a bank robbery prior conviction and four of defendant's prior prison term enhancements were not supported by substantial evidence. In all other respects, we affirm the judgment.

## FACTS

### A. *Prosecution*

On the morning of April 27, 2007, Los Angeles County Sheriff's Deputy Janet Homan saw two men outside the Von's Market in Valencia. The men gave her a "bad feeling." One was wearing a white painter's jumpsuit, a yellow hat with goggles, and a paper mask, and the other had on a "security outfit [that] did not match for the area." The

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[1] All further statutory references are to the Penal Code.

two men entered a branch of the Washington Mutual bank. Deputy Homan looked inside the bank and observed what appeared to be a robbery of the bank. She went inside a store next to the bank and reported the robbery to the police. At trial, she identified defendant as the man in the white painter's jumpsuit, yellow hat and paper mask.

Several customers and employees in the bank at the time of the robbery testified at trial. The men took money belonging to the bank from bank employees and also took money from customers.

Teller Diane Moreno (Moreno) said two men ordered the staff to "open[] up the cabinets" and not "push any buttons." Defendant took a wallet containing $600 from bank customer Thomas Bartlette and then ordered him to lie on the floor. He also took bank customer Mark Copado's money, which had been obtained from cashing his payroll check. Defendant obtained $985 in cash from Moreno. Manager Sonia Mubaraka said the two men screamed and threatened people with a gun.

A few minutes after watching the two men enter the bank, Deputy Homan observed the two exit the bank and leave in a green four-door BMW with a handicapped license plate. Deputy Jeffrey Jackson, who responded to the call about a robbery in progress, spotted the green BMW and engaged in a pursuit, during which the BMW traveled at over 100 miles per hour. A money bag was thrown onto the street at some point. After losing sight of the BMW, Deputy Jackson found it parked by the Havenhurst Avenue off-ramp. Maria Newton (Newton) was alone in the vehicle and stated that the two men "had forced her into her car at gunpoint and told her to drive."

Canine units found defendant and codefendant Leroy Bruce Thompson (Thompson)[2] hiding in a residential garage near the vehicle. Numerous items were recovered on the freeway along the path of the pursuit, including a brown leather tool belt and a blue windbreaker, a white gown, a white head rag, and a black hat with the word

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[2] Thompson, who was a codefendant at trial, is not a party to the appeal. We previously affirmed the judgment against Thompson. (*People v. Thompson* (2012, B231255) [nonpub. opn.].)

"security." A black glove was also found in an alleyway near where defendant was found. A search of the BMW revealed an envelope with written directions to the bank that was robbed. Insurance papers for the BMW in the names of defendant and Newton[3] were also found inside the car.

DNA found on a head rag matched defendant's DNA profile. Thompson was found to have possibly been the source of the DNA found on the hat band of the black hat with the word "security."

**B.** ***Defense***

Newton testified that she drove defendant and Thompson to the bank and, after they entered the car, she drove fast and recklessly, but she insisted she did not know what happened inside the bank. Newton confirmed that defendant was wearing a white jumpsuit and Thompson was wearing a blue windbreaker. Before the robbery, Newton got out of the car at the mall to buy coffee, and defendant and Thompson were gone when she came back.

When the men got back into the car, they both "ducked down" as she drove out of the parking lot. After driving fast on the freeway, she exited at a ramp and stopped. Defendant and Thompson left the car. She falsely told the police that they forced her to drive them because she did not want to disclose defendant's name to the police.

## DISCUSSION

**A.** ***Trial Court's Refusal to Conduct a Competency Hearing***

Defendant contends that the trial court violated his rights to due process when it did not find substantial evidence of incompetence and refused to hold a competency hearing. We disagree.

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**3** Newton is not part of the instant appeal.

**1. Applicable Law**

A defendant who is mentally incompetent cannot be tried. (§ 1367, subd. (a).) A mentally incompetent defendant is one who "as a result of mental disorder or developmental disability . . . is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner." (*Ibid.*) Section 1368 provides that "(a) [i]f, during the pendency of an action and prior to judgment, a doubt arises in the mind of the judge as to the mental competence of the defendant, he or she shall state that doubt in the record and inquire of the attorney for the defendant whether, in the opinion of the attorney, the defendant is mentally competent. . . . [¶] (b) If counsel informs the court that he or she believes the defendant is or may be mentally incompetent, the court shall order that the question of the defendant's mental competence is to be determined in a hearing . . . ."

Even if the trial court has no doubt as to defendant's mental competence, due process requires that if the defendant comes forward with substantial evidence of incompetence to stand trial, a doubt as to the defendant's competence exists and a competency hearing must be held. (*People v. Hayes* (1999) 21 Cal.4th 1211, 1281; *People v. Welch* (1999) 20 Cal.4th 701, 738.) Substantial evidence is that which raises a reasonable doubt as to defendant's competence. (*Hayes*, *supra*, at p. 1281; *Welch*, *supra*, at p. 738.) It must reasonably inspire confidence and be of solid value. (*People v. Marshall* (1997) 15 Cal.4th 1, 34.) The trial court is not free to reject the defendant's substantial evidence of incompetence based on contrary evidence or the court's own observations of defendant. (*Welch*, *supra*, at p. 738; *People v. Stankewitz* (1982) 32 Cal.3d 80, 93.)

A different rule applies when the evidence raising a doubt as to defendant's competence is less than substantial. When less than substantial evidence is presented, the trial court is not required to declare a doubt as to defendant's competence but has the discretion to do so. (*People v. Welch*, *supra*, 20 Cal.4th at pp. 740, 742.) Its determination will be reviewed for an abuse of discretion. (*Id.* at p. 740.)

The trial court's determination as to whether a competency hearing is required should be given great deference. "'An appellate court is in no position to appraise a defendant's conduct in the trial court as indicating insanity, a calculated attempt to feign insanity and delay the proceedings, or sheer temper.'" (*People v. Danielson* (1992) 3 Cal.4th 691, 727, overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.)

If a defendant offers substantial evidence of incompetence, refusal to hold a hearing is a denial of due process and is per se reversible error. (*People v. Pennington* (1967) 66 Cal.2d 508, 511. However, "'The court's decision whether to grant a competency hearing is reviewed under an abuse of discretion standard. [Citations.]'" (*People v. Oglesby* (2008) 158 Cal.App.4th 818, 827, quoting *People v. Ramos* (2004) 34 Cal.4th 494, 507.)

**2. Relevant Proceedings in the Trial Court**

On November 9, 2010, 12 jurors and three alternates were selected. One alternate was excused on November 15. Shortly thereafter, counsel for Thompson told the court that his client was having a seizure.

On November 17, Thompson was still in the hospital and a doctor estimated he could return to court by November 21. On Monday, November 22, Thompson returned to court. Thompson claimed doctors had found lesions on the left side of his brain and he was having strokes in his sleep.

Defendant asked to address the court. Counsel informed the court that defendant wore a neck brace from an auto accident injury in 2007, and was in pain all the time. The trial court stated this was an ongoing problem that would not be resolved by delaying trial. Counsel indicated there were times when he had visited defendant in jail and he had appeared medicated and "not quite coherent."

The court noted he had spoken to the previous judge who had a "very difficult" time getting the case ready for trial, but it had to be tried because it was pending so long. The court stated it needed current medical reports for both defendant and Thompson.

Defendant's counsel informed the court defendant was transgender and had issues getting hormone treatment, he had related depression, as well as his neck pain.

On Tuesday, November 23, the court received a report that defendant had chicken pox and could not come to court. The court continued trial until December 1, 2010, to allow defendant to recover.

On Monday, December 6, the court indicated it had spoken at length with the assistant chief physician at the jail. The court was informed that defendant did not have chicken pox, but had been exposed and was quarantined on that basis. Defendant was receiving pain medication for his neck three times a day. He had also contracted conjunctivitis and was given drops for that condition. The court also noted that the doctors believed Thompson was staging epilepsy and there was no pathology or basis for the seizures. He was also not taking his seizure medication.

On December 7, the bailiff informed the court that defendant had not been medically cleared for his conjunctivitis. On December 8, defendant returned to court and the trial proceeded with no more alternates, after a juror reported being ill with a fever and was excused. During the lunch recess, Thompson banged on a door and called deputies. The bailiff opened the door, and defendant had a cut on his left inner arm, which was bleeding. Defendant was saying that he wanted to die. Defendant was taken to the hospital. A razor blade was recovered from defendant's cell toilet.

The prosecutor said he found the timing suspect. "Today we sat our last alternate juror, and I think the fact that he took, you know, it upon himself, at this point in time to do that, I just have got concerns that he's attempting to voluntarily absent himself." The court noted the incident occurred "right after the DNA evidence that linked him positively with DNA to one of the items used in the bank robbery, he may have felt that there is no way out." The court noted that it did not know defendant's state of mind, and counsel had talked to defendant about the possibility of testifying. Counsel indicated that he had spoken to defendant but did not get an answer from him.

On Friday, December 10, defendant returned to court for what was anticipated to be the final day of testimony. Defense counsel noted he was aware of defendant's

medical and emotional problems because he "was aware of the fact that [defendant] was in federal custody on a similar case and was evaluated by Dr. Vicary." Dr. Vicary had also seen defendant on an outpatient basis prior to this case.

Under the circumstances, counsel believed he was required "to make a [section] 1368 motion" based on defendant cutting himself and telling counsel he did not want to live. Counsel stated defendant was transgender and received his hormone treatment erratically from the jail. Counsel stated there had been times when he met with defendant at the jail and had difficulty communicating with defendant because he was heavily medicated. Counsel explained that he had spoken to defendant that morning, and "[h]e seems to be somewhat in a daze, and all that I can get from him is, 'I'm not going to make it, I'm not gonna make it,' so that has multiple meanings. What, I don't know."

Counsel indicated this was a crucial stage of trial because a decision had not been made whether defendant would testify. Counsel indicated defendant was "kind of beyond that and not communicating with me, and I don't know if it's the medication or the state of mind, or whatever, but there are some serious doubts that he would be able to assist me in handling this case."

Counsel asked the court to appoint Dr. Vicary to assess defendant. He also asked that a psychiatrist see defendant and provide his medical records to the court, "because that was also a robbery case in federal court, and the judge ordered some sort of treatment." The court denied the requests. The court noted that if defendant "had really intended to kill himself in the lockup after hearing the DNA evidence in this case that links him to the robbery, he would have cut an artery, not a vein." The court found defendant was "trying to resist the conclusion of this case." The court expressed its "view that these defendants . . . do not want the trial to conclude, and they're doing everything they can to prevent it, . . . including Mr. Thompson's refusal to come to court." The court added that it had "lost more time in this one case than I have in all the 265 cases I've tried over 28 years."

The court then asked whether there was anything else that needed to be done before the jurors were returned to court. Defendant's counsel indicated he might not be

able to stipulate to some evidence, as he had earlier agreed to do, if he could not get defendant's cooperation. The court found that this was one more indication that defendant was doing everything possible to prevent the trial from moving forward, since counsel had previously agreed to enter into the stipulations.

After further discussion regarding trial delays, defendant's counsel asked if the court would be opposed to Dr. Vicary seeing defendant over the weekend. The court stated that it was opposed. They were supposed to take care of "the final wrap up. The prosecution's case is to end in a matter of hours, and any defense you want to put on."

When the court asked if there was anything else they needed to take care of before the jury came back in, Thompson interjected that he wanted a *Marsden*[4] hearing. The court attempted to get Thompson to explain the basis of his request, and he eventually complained that the doctors were changing his medications and lying about his condition, and he requested that the court contact the doctors about that.

Thompson added, "You're talking about I'm delaying a trial, I need to delay it. It needs to be delayed until I get proper medical attention, proper representation." Thompson accused the court of trying to "railroad me into the penitentiary."

After Thompson's further complaints, the trial court gave him a *Marsden* hearing. The court then noted that Thompson had not allowed the court to conclude the hearing "and has been belligerent enough to be removed from the courtroom by the bailiffs." The court was denying the *Marsden* motion and continuing the proceeding, finding that Thompson had voluntarily absented himself. The court reiterated that defendant and Thompson were "trying to delay the trial by whatever means and manner they can bring to bear. They've been very successful."

The court again asked if there was "anything else," and defendant's counsel informed the court that defendant had been sleeping beside him in court and was concerned the jury would see him sleeping instead of paying attention. The court stated,

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**4** *People v. Marsden* (1970) 2 Cal.3d 118.

"When he's sitting there with his eyes closed, it doesn't mean he's sleeping. What you can observe, what you know is he's sitting upright with his eyes closed. That doesn't mean he's sleeping."

The court concluded defendant was "playing games. He just received the medication. It can't knock him out in two seconds. It was an antipsychotic and Vicodin to calm him down." The court later stated his belief that defendant was playing games and attempting to delay the trial. The court also noted defendant's eyes were open.

The following Monday, December 13, defendant's counsel informed the court that he had visited defendant on Saturday. Defendant was on suicide watch. Counsel stated the interview was short, and defendant "was somewhat medicated and sedated, and so I'm still declaring a doubt, and I'm not going to put him on the stand. I don't even think he is competent to testify." The court pointed out that defendant had cut his arm and said that he wanted to die, "so that's a pretty good basis for a suicide watch, and what happens as a result is beyond my control."

**3. Defendant's Claim of Substantial Evidence of Incompetence**

It is important to note that the trial took place about three and a half years after defendant was arrested and charged. About eight months after the information was filed, in August 2008, Thompson filed a motion to sever. That motion was denied on April 3, 2009. Following the denial of Thompson's motion, defendant made his first *Marsden* motion. That motion was heard and denied.

Defendant failed to appear at the next hearing, on May 12, 2009, and the matter was continued. Defendant appeared at the following hearing, and the matter was continued numerous times. On August 31, 2010, trial was set for October 18. Defendant made his second *Marsden* motion, which was denied.

On September 16, defendant in pro. per. filed a petition for writ of habeas corpus, seeking dismissal of the case on the ground of violation of his right to a speedy trial. On October 18, the date set for trial, the case was transferred for reassignment. The case was

again called for trial on November 1, but Thompson refused to come out of his cell, and the court issued an extraction order.

On November 2, counsel agreed to start trial on November 8. The trial court denied defendant's habeas corpus petition.

The problems in the case continued once the trial commenced. Some of the problems were outside the control of the parties, such as defendant's exposure to chicken pox and contracting conjunctivitis. Other problems were caused by the parties, including Thompson's seizure, which may have been staged, and defendant's cutting himself near the close of trial.

As pointed out by the People, the timing of defendant's act of cutting himself was interesting. The cutting occurred right after testimony that it was defendant's DNA on the head rag worm by one of the bank robbers. The cutting also occurred when there were no more alternates. In *People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1047, the court found "the suspicious timing of the wrist-slitting incident and other bizarre behavior near the end of the guilt phase" of the trial was a relevant factor in determining competence to stand trial. Also relevant were the defendant's prior use of "various tactics to delay and derail the trial." (*Ibid.*) The record here is replete with evidence that both defendants successfully used various tactics to delay the start of the trial and, once trial began, to delay its conclusion.

The nature of the cutting also was relevant. While defendant's arm was bleeding heavily, the wound did not appear life-threatening. The court noted that defendant did not hit an artery. Defendant was allowed to return to court within less than two days.

The record indicates that defendant had been lucid and involved in discussions with the court during the trial. On December 6, 2010, defendant discussed the cause and treatment of his eye infection and, during a conversation about whether he would waive a jury trial on his prior conviction allegations, he corrected the court about the date of one of his prior convictions.

It is true that on December 10, 2010, defendant's counsel stated that defendant "seems to be somewhat in a daze, and all that I can get from him is, 'I'm not going to

make it, I'm not gonna make it.'" Counsel also stated defendant was "unavailable for [counsel] to talk with him," and was "not communicating with [him]." Counsel was not sure if this inability to communicate was due to defendant's medication or unstable state of mind. Later that day, counsel indicated he was talking with defendant to determine whether he would testify, and did not indicate that defendant was not able to participate in those conversations.

When defense counsel questioned defendant's competence, it was a factor for the trial court to consider in determining whether there was substantial evidence to raise a doubt about defendant's competence. (*Drope v. Missouri* (1975) 420 U.S. 162, 179 [95 S.Ct. 896, 43 L.Ed.2d 103].) However, the trial court's observations of defendant's participation in the trial were a counterbalancing factor. (*People v. Panah* (2005) 35 Cal.4th 395, 433-434.)

In *Drope v. Missouri, supra,* the defendant had been evaluated by a psychiatrist before trial. The report stated the defendant "'had difficulty in participating well,'" and "'was markedly circumstantial and irrelevant in his speech.'" (420 U.S. at pp. 164, fn. 1, 175-176.) The defense counsel asserted that the defendant was not of sound mind and requested a further psychiatric examination. At trial, the defendant's wife and victim testified that they told the defense counsel that the defendant was sick and needed psychiatric care. Days before the trial, the defendant had attempted to choke his wife to death and on the morning before trial, the defendant shot himself in the abdomen in what was accepted as a "'bona fide attempt at suicide.'" (*Id.* at pp. 166, 170, 181, fn. 16).

Here, by contrast, the trial court found that defendant cut himself in a non-life threatening way, and his actions were not a "'bona fide attempt at suicide.'" (*Drope v. Missouri, supra,* 420 U.S. at p. 170.) The evidence did not indicate that defendant suffered from a mental illness. The trial court also had access to prior medical reports and spoke to the assistant chief physician in the jail, and there was apparently no mention of defendant's mental instability or inability to proceed with trial. Moreover, the trial court itself had observed defendant participating in the trial.

Defendant also contends that his medicated state and other conditions affected his possible incompetence. It is true that counsel had informed the court prior to defendant cutting himself that before trial there had been times where defendant appeared medicated. The record does not support the contention that defendant's medicated state affected his ability to assist counsel. While the morning defendant appeared in court after cutting himself counsel did indicate that defendant's medicated state interfered with his ability to assist counsel, his medication in conjunction with other factors, such as the trial court's determination that defendant was attempting to delay the proceedings, did not raise a reasonable doubt about his competence. Rather, it "indicated at most that he may have been overmedicated," but not that "he was unable to understand the nature of the proceedings or to cooperate with his counsel." (*People v. Danielson, supra,* 3 Cal.4th at p. 727.)

Defendant's complaints about chronic pain from a neck injury or his conjunctivitis did not establish incompetence. A competency hearing is not required where defendant has chronic conditions causing pain and associated symptoms but is nonetheless coherent, lucid, and able to communicate with counsel. (*People v. Avila* (2004) 117 Cal.App.4th 771, 778-779.)

The law requires more than bizarre actions or statements from defense counsel to raise a reasonable doubt about defendant's competence. (*People v. Rogers* (2006) 39 Cal.4th 826, 847; *People v. Danielson, supra,* 3 Cal.4th at p. 727.) The trial court, which was familiar with the proceedings and the delays caused by defendant and Thompson, and which was able to observe defendant throughout the proceedings, was in the best position to determine whether there was substantial evidence of incompetence, or whether the evidence showed defendant was attempting to delay the conclusion of the trial by any means necessary. (*Danielson, supra,* at p. 727.) The record supports the trial court's conclusion that the latter was the case here. Consequently, there was no abuse of discretion in refusing to hold a competency hearing. (*People v. Ramos, supra,* 34 Cal.4th at p. 507; *People v. Oglesby, supra,* 158 Cal.App.4th at p. 827.)

**B.** ***Trial Court's Refusal to Appoint a Doctor***

Defendant also contends that the trial court violated his right to effective assistance of counsel and to due process by failing to appoint Dr. Vicary to examine him. We disagree.

Defendant submits that there was evidence that supported the appointment of a psychiatrist to evaluate his mental status, in that he made a suicide attempt two days before the request was made. As previously stated, the trial court did not feel that it was a suicide attempt, based on the timing and nature of the cutting.

Defense counsel asked the court "to appoint Dr. Vicary and see if he is available over the weekend to see [defendant], to give him an assessment." The request was refused by the trial court. The court set forth in great detail the reason for the refusal. "To begin with, if [defendant] had really intended to kill himself in the lockup after hearing the DNA evidence in this case that links him to the robbery, he would have cut an artery, not a vein. It is my conclusion that he is trying to resist the conclusion of this case, which, to some extent, both of them should understand it doesn't gain you anything to get a mistrial here, to the extent that you don't get free, you get another trial. Although it doesn't look particularly good, given all the evidence the prosecution has, the best way to get free is to get an acquittal, and that means a trial. But I will not appoint the doctor, and I'm not going to change the process. It's my view that these defendants, the two men, do not want the trial to conclude, and they're doing everything they can to prevent it, so — including Mr. Thompson's refusal to come to court. We lost hours of trial time, even though I issued an extraction order. We've lost more time in this one case that I have in all the 265 cases I've tried over 28 years. I've never had these problems, particularly with these defendants."

For many of the reasons set forth above, we do not find that the trial court erred in failing to appoint Dr. Vicary.

It is true that indigent defendants have a constitutional right to appointment of an expert when reasonably necessary for the defense of their case. (*Corenevsky v. Superior Court* (1984) 36 Cal.3d 307, 319-320.) However, defendant has failed to cite any case

where the denial of a medical expert to assess defendant's competence to stand trial violated a defendant's right to the effective assistance of counsel.

The trial court, not having found substantial evidence to warrant a competency hearing, was not required to appoint an expert, even if Dr. Vicary would have been available over the weekend.

**C. *Failure of Trial Court to Stay Count 11 (Attempted Robbery)***

Defendant contends the trial court violated section 654,[5] which prohibits punishment for multiple offenses arising from the same act or from a series of acts during a single robbery from a single victim. The trial court imposed separate sentences for the robbery (count 3) and attempted robbery (count 11) as to the single victim, Moreno. According to defendant, when the single victim is involved, the multiple victim exception to section 654 cannot be applied to justify multiple convictions.[6] We disagree.

"The test for determining whether section 654 prohibits multiple punishment has long been established: 'Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.'" (*People v. Britt* (2004) 32 Cal.4th 944, 951-952.) "If, on the other hand, defendant harbored 'multiple criminal objectives,' which were independent of and not merely incidental to each other, he may be punished for each statutory violation committed in

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[5] Section 654, subdivision (a), provides: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other."

[6] The People agree with defendant that he cannot be convicted and sentenced on both counts 3 and 11, because both named the same victim. We disagree and uphold the trial court's refusal to apply section 654 to count 11.

pursuit of each objective, 'even though the violations shared common acts or were parts of an otherwise indivisible course of conduct. [Citation.]'" (*People v. Harrison* (1989) 48 Cal.3d 321, 335; accord, *People v. Vu* (2006) 143 Cal.App.4th 1009, 1033.) "'The principal inquiry in each case is whether the defendant's criminal intent and objective were single or multiple.' [Citation.] 'A defendant's criminal objective is "determined from all the circumstances . . . ." [Citation.]' [Citation.]" (*In re Jose P.* (2003) 106 Cal.App.4th 458, 469.)

Whether section 654 applies in a given case is a question of fact for the trial court, which is vested with broad latitude in making its determination. (*People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1312; *People v. Herrera* (1999) 70 Cal.App.4th 1456, 1466, disapproved on another ground in *People v. Mesa* (2012) 54 Cal.4th 191, 199.) Its findings will not be reversed on appeal if there is any substantial evidence to support them. (*Hutchins*, at p. 1312; *Herrera*, at p. 1466; *People v. Nichols* (1994) 29 Cal.App.4th 1651, 1657.) "We review the trial court's determination in the light most favorable to the [defendant] and presume the existence of every fact the trial court could reasonably deduce from the evidence." (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143; see *People v. Cleveland* (2001) 87 Cal.App.4th 263, 271 [trial court's finding of "'separate intents'" reviewed for sufficient evidence in light most favorable to the judgment].)

In the instant case, after Moreno was robbed of $985 cash she had obtained from the bank's cash dispenser for a customer the first time (count 3), the robbers sought cash from other cash dispensers. A later effort to obtain more cash from Moreno's dispenser was accompanied by a verbal threat. Moreno testified that the acts occurred within a "very, very short amount of time."

In *People v. Nubla* (1999) 74 Cal.App.4th 719, the defendant committed several acts of violence against his wife, and the appellate court held it was not error to impose multiple sentences for assault and corporal injury on a spouse. The court stated that the offenses were "somewhat analogous to sex offenses in that several similar but separate assaults occurred over a period of time." (*Id.* at p. 730.) The court stated that just as

"each sexual assault may be viewed as a separately punishable criminal act, notwithstanding that all the offenses arguably were done to obtain sexual gratification," (*ibid*.) because "'"[n]one of the sex offenses was committed as a means of committing any other, none facilitated commission of any other, and none was incidental" to any other'" (*id.* at p. 731), the defendant's separate assaults were not done to facilitate each other and were not incidental to each other. Accordingly, "[t]he trial court was entitled to conclude that each act was separate for purposes of . . . section 654." (*Ibid*.)

Similarly here, the first robbery was completed and other robberies committed before defendant returned to attempt to rob Moreno a second time. The two robberies were not committed to facilitate the other; neither was one incidental to the other.

By contrast, in *People v. Marquez* (2000) 78 Cal.App.4th 1302 "[i]n one seamless ill-conceived effort, [the] defendant walked up to the counter at [a] [r]estaurant, threatened [the] waitress . . . with a handgun, thereby convincing her to hand over her tips lying on the counter and [the restaurant's] operating money from the cash drawer. This was an indivisible transaction involving a single victim who was forced to relinquish possession of two separately owned amounts of money at the same place and at the same time." (*Id*. at p. 1307.) The trial court "erred in sentencing [the] defendant for committing two robberies when only one occurred." (*Id*. at p. 1308, italics omitted.)

The facts in the instant case are distinguishable from *Marquez*. Although the offenses occurred in a brief period of time, defendant had committed the first robbery of Moreno, and then the attention was focused on other cash dispensers. After that, defendant returned to Moreno and attempted to rob her again. The acts were not committed in "one seamless ill-conceived effort" as in *Marquez*. (*People v. Marquez, supra,* 78 Cal.App.4th at p. 1307.)

Finally, the case of *People v. Trotter* (1992) 7 Cal.App.4th 363 supports separate punishment. In *Trotter*, the defendant was driving a vehicle with a police officer in pursuit. Three times during the course of the pursuit, the defendant fired at the officer. (*Id*. at p. 366.) The defendant was convicted on three counts of assault with a firearm on a peace officer. The trial court sentenced him consecutively on all three counts. He

contended that under section 654 he could be sentenced on only one of the counts. (*Id*. at pp. 365, 366.)

The court noted that each assault was a separate volitional act. Each was separated from the others by a period of time in which reflection and consideration was possible. Each posed a separate and distinct risk to the pursuing police officer. Each "evinced a separate intent to do violence." (*People v. Trotter*, *supra*, 7 Cal.App.4th at p. 368.) The court concluded that the defendant should not be rewarded with only one punishment for the three assaults "'where, instead of taking advantage of an opportunity to walk away from the victim, he voluntarily resumed his . . . assaultive behavior.'" (*Ibid*., quoting from *People v. Harrison*, *supra*, 48 Cal.3d at p. 338.) It therefore upheld separate and consecutive punishment on each of the three assault counts. (*Trotter*, *supra*, at p. 368.)

The same is true here. Defendant could have stopped his crimes after each robbery, but he did not. He went to another cash dispenser or victim. The trial court's refusal to apply section 654 to count 11 is supported by substantial evidence.

The cases cited by defendant in support of his position are distinguishable. In *People v. Irvin* (1991) 230 Cal.App.3d 180, the defendant threatened an automobile driver with a knife, entered the driver's seat, drove a short distance, took the victim's purse and money, and ordered her to leave while he took her automobile. (*Id*. at p. 183.) The jury convicted the defendant of second degree robbery with the use of a knife and grand theft of automobile. (*Ibid*.) The appellate court determined that the convictions for both robbery and grand theft constituted impermissible multiple convictions for one transaction, since there was only one continuous course of events. (*Id*. at pp. 185-186.) In the instant case, the first robbery was completed before defendant returned to Moreno and attempted to rob her a second time.

The case of *People v. Bailey* (1961) 55 Cal.2d 514 does not require a different result. While the court stated that where a defendant committed a series of petty thefts by fraudulently obtaining several welfare checks, she was properly convicted of one felony offense because she acted pursuant to a single plan. (*Id*. at p. 519.) The court did go on

to state that whether a series of wrongful acts constitutes a single offense or multiple offenses depends upon the facts of each case. (*Ibid*.) In the instant case, the trial court's refusal to apply section 654 was supported by the facts of the case. Defendant could have stopped his crimes after each robbery but elected not to do so.

**D. *Substantial Evidence of Third Federal Bank Robbery Conviction***

The amended information alleged defendant had suffered three prior serious felony convictions under section 667, subdivision (a)(1). All three alleged priors were for bank robbery under federal law. Defendant contends that there was no evidence to prove that he suffered the third prior federal felony conviction. The People agree.

For purposes of sections 667 and 1170.12, a serious felony is one defined in subdivision (c) of section 1192.7. (§§ 667, subd. (a)(4), 1170.12, subd. (b)(1).) It includes bank robbery. Prior convictions must be proved beyond a reasonable doubt. (*People v. Monge* (1997) 16 Cal.4th 826, 836.)

The amended information listed three prior serious or violent felony convictions. The third listed a case number of 78627-012, charging a violation of 18 United States Code section 2113(a)(d), with a conviction date of December 10, 1988. The sole evidence introduced to prove the prior convictions was a section 969b packet, admitted as court's Exhibit 1. After reviewing the packet, the sentencing court found all three prior felony convictions true.

The documents in court's Exhibit 1 do not include information on a case with the number 78627-012, nor do they include a case with a conviction date of December 10, 1988. The number appears to be defendant's "Register No." in federal prison. The evidence supporting defendant's third prior federal felony conviction was insufficient, and the true finding must be reversed and the enhancement stricken.[7]

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[7] Because double jeopardy does not bar retrial of a prior conviction allegation, the allegation may be retried should the People choose to do so. (*People v. Cortez* (1999) 73 Cal.App.4th 276, 284 & fn. 7; accord, *Monge v. California* (1998) 524 U.S. 721, 724-734 [118 S.Ct. 2246, 141 L.Ed.2d 615]; *People v. Monge, supra*, 16 Cal.4th at p. 836.)

Based upon the foregoing, defendant submits that the case must be remanded for reconsideration of his *Romero*[8] motion. We disagree.

Defendant's counsel, at sentencing, argued that defendant's 1984 conviction was remote. Counsel and the court recognized that defendant had not been released long before the current offense. Defendant had not been free from prison for two years when the current crimes were committed. The court noted that the instant offense was committed while defendant was on supervised release from his most recent federal bank robbery conviction.

In denying the *Romero* motion, the court found as follows: "In looking at . . . defendant's record, I find that he has numerous felony convictions; that he was released shortly before this trial some two years and was on supervised release, also known as federal probation, at the time of the commission of this offense. I cannot say that . . . defendant is outside the spirit of the scheme of the [']Three Strikes['] law at all."

In light of this statement, the fact that defendant was proven to have two prior strike convictions as opposed to three does not warrant a new *Romero* hearing. The result would be the same.

**E. *Substantial Evidence of Four Prior Prison Terms***

Defendant contends that there was sufficient evidence of only three prior prison terms, as opposed to the seven alleged in the amended information. Again, the People agree.

When a defendant is convicted of a felony (other than a violent felony specified in section 667.5, subdivision (c)) and sentenced to state prison, section 667.5, subdivision (b), mandates imposition of a one-year enhancement for each prior separate prison term served by the defendant for a felony conviction, unless the prison term was served prior to a period of five years in which the defendant remained free of both prison

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**8** *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

custody and the commission of an offense that results in a felony conviction (frequently referred to as the "five-year washout period"). The enhancement may not be imposed for any prior felony for which the defendant did not serve a prior separate prison term. (§ 667.5, subd. (e).) A prior separate prison term is "a continuous completed period of prison incarceration imposed for the particular offense alone or in combination with concurrent or consecutive sentences for other crimes, including any reimprisonment on revocation of parole which is not accompanied by a new commitment to prison, and including any reimprisonment after an escape from incarceration." (§ 667.5, subd. (g).)

The sole evidence introduced to prove the seven prior prison term enhancements was the same documentation admitted as court's Exhibit 1. The court found all seven prior prison term allegations to be true.

It appears from court's Exhibit 1 that defendant served a single prison term for four prior convictions. According to the abstracts of judgment, defendant was sentenced in case No. MCR3649 to four years eight months on February 27, 1981. About a week later, on March 5, 1981, defendant was sentenced to two years in case No. CR6588. On March 20, 1981, he was sentenced to two years in case No. A080091. Two months later, on May 21, 1981, defendant was sentenced to two years in case No. A194435. There is no evidence that he served a "separate prison term" for each of the four state convictions for which he received one year enhancements. It appears that he served one term for all four convictions.

The trial court's findings on three of the four one-year prior prison term enhancements imposed pursuant to section 667.5, subdivision (b), are not supported by substantial evidence and must be reversed and the enhancements stricken.[9]

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[9] Again, they may be retried if the People choose to do so. (See *People v. Fielder* (2004) 114 Cal.App.4th 1221, 1225-1226.)

## DISPOSITION

The true findings as to the prior serious felony conviction identified as case No. 78627-012, with a conviction date of December 10, 1988, and as to three of the four prior convictions in 1981 for which defendant served a prison term are reversed. The enhancements imposed thereon are stricken. In all other respects, the judgment is affirmed. The Superior Court is directed to prepare a corrected abstract of judgment and forward a copy to the Department of Corrections and Rehabilitation.

JACKSON, J.

We concur:

WOODS, Acting P. J.

ZELON, J.